ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, July 28, 2005

Federal Trade Commission Conference Center
601 New Jersey Avenue, N.W.
Washington, D.C.

The hearing convened, pursuant to notice, at 9:37 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson

JONATHAN R. YAROWSKY, Vice Chair

BOBBY R. BURCHFIELD, Commissioner

W. STEPHEN CANNON, Commissioner

DENNIS W. CARLTON, Commissioner

MAKAN DELRAHIM, Commissioner

JONATHAN M. JACOBSON, Commissioner

DONALD G. KEMPF, JR., Commissioner

SANFORD M. LITVACK, Commissioner

JOHN H. SHENEFIELD, Commissioner

DEBRA A. VALENTINE, Commissioner

JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director & General Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

ALAN J. MEESE, Senior Advisor

HIRAM ANDREWS, Law Clerk

KRISTEN M. GORZELANY, Paralegal

C O N T E N T S

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his/her testimony.

P R O C E E D I N G S

CHAIRPERSON GARZA: Let me welcome our distinguished panelists on behalf of the Commission, and thank you for being here today to participate in our hearing on Robinson-Patman issues. If you would take your seats at the table.

The Commission, as you know, is in the process of gathering information on the issues it has selected to study. These hearings are an integral part of that process. They enable the Commission to hear from a broad range of experts and to probe and understand the competing arguments. And because the hearings are open, they inform the public as well.

The topics we have selected to study present complex and important issues upon which reasonable people may disagree and have disagreed, and as to which there may be no easy answers. Your presence here today and your thoughtful writings make this clear.

Again, it's important to bear in mind the

fact that the Commission has selected an issue for study does not mean that we have already decided on a recommendation or findings; we have not. Our deliberations will be conducted in the open, just as we selected issues for study, at public meetings following these next several months of hearings and study.

Again, I would like to thank our panel for being part of the process, and to explain very briefly before we start what format we will follow. First we would like to give each of our panelists an opportunity to summarize his testimony or make his statement. We ask you to try to keep those statements brief, about 5 minutes, so we can maximize our time for discussion. After each panelist has made his statement, there will be questions from the Commissioners. I think Commissioner Litvack will be leading the questions initially for the Commission. He will take about 20 minutes to do so. Following that, each Commissioner will have about 5 minutes to put forth questions he or she may have. The order of

Commissioners is on a sheet that the staff left at your places. Of course, any Commissioner may choose to pass on questioning.

The hearing is being recorded. Transcripts will be made available to the public. Hard copies of the witness statements are available on the table outside the room at the beginning of the hallway.

So with that, can I please ask Mr. Campbell to begin?

MR. CAMPBELL: Good morning, and thank you, Madam Chairman. My name is Jay Campbell. I appear today on behalf of the National Grocers Association, which is the only grocery industry association devoted solely to representing the independent sector of the grocery industry. I am President and CEO of Associated Grocers in Baton Rouge, Louisiana, and past Chairman and current member of the Board of Directors of NGA. You will find more information about NGA and my company in my written statement, which I ask you to include in the record of these proceedings.

As part of your overall review of our country's antitrust laws, today's session is focused on Robinson-Patman, which next year will turn 70 years old. If you check the record, its purpose was to restore equality of opportunity--restore equality of opportunity. It has been attacked over the years as protectionist legislation, as being designed to protect inefficient retailers, and yet nothing could be farther from the truth.

R-P is an integral part of our antitrust fabric and framework. It is designed to benefit and protect the American consumer by ensuring the widest variety and selection of highest quality products at the lowest possible prices. It is designed to eliminate unfair trade practices or unfair advantage and/or unlawful price discrimination, which create competitive injury, and to eliminate restraint of trade in monopolies that lessen competition.

At NGA and at our company, we desire merely an open market fair to all competitors with

equality of opportunity, where survival depends upon efficiency rather than upon scale or unfair advantage of the buyer.

Our antitrust laws are designed to keep the marketplace diverse by preventing mergers and acquisitions resulting in undue concentrations of market power, by outlawing multi-party arrangements restraining a firm's ability to compete, and by preventing monopolies unless created by innovation. R-P brings all of the existing laws together and is designed to maintain a diverse, fair, and efficient marketplace whereby each competitor has a fair chance to survive on its own merits with equality of opportunity.

What is equality of opportunity? I submit to you that it is the timely availability from a seller of the product, the packaging, the promotions, the price and the payment terms offered on an objectively determined basis to the buyer. This creates that equality of opportunity that the Act referenced in 1936.

What is efficiency and diversity?

Consumers should have the opportunity to experience and enjoy efficiency and diversity in the marketplace. Efficient firms use their lower cost to give their customers lower prices. Diversity assures consumers have a wide range of choices and alternatives in the shopping experience.

Just a few factors that contribute to all of our decisions when we are consumers: No. 1, product availability; No. 2, the quality of the products; No. 3, the pricing of the products; No. 4, the packaging of the products; and No. 5, the level of service provided.

By preventing discrimination in the terms of selling, R-P helps maintain that diverse marketplace. However, R-P law does not protect the inefficient retailer. It promotes efficiency and ultimately lowers consumer price, since lower prices from suppliers should only be provided if the buyer is more efficient, not merely large and very demanding. Properly interpreted and sensibly enforced, R-P encourages operational efficiency at the buyer level since sellers should never lawfully

give any preference to inefficient customers.

The Act is antitrust's only significant restraint on the ability of power buyers to obtain special treatment based on their size or scale, rather than on their actual efficiency, conduct, and performance.

NGA is opposed to any attempt to weaken or to repeal Robinson-Patman. We believe that we would see increasing concentration at retail more rapidly than we are seeing today, and consumers would suffer the loss and limitation of choices in a market with very little diversity. We believe that a renewed enforcement effort by the FTC is needed, one focused on the main R-P problems of today's marketplace: power buyers and the timely offering of objectively determined selling terms.

If there was one change needed in the law it would be oversight of actual discrimination in the price of certain business services. For example, interchange fees paid by retailers that accept debit and credit cards. As you know, the statute only covers goods. Today interchange fees

for debit and credit cards are a major cost of doing business and are open to significant abuse by the power buyers, or now power users, of such services. And yet, there is no economic efficiency or cost justification in the price or rate difference. There is no competitive alternative either in the marketplace for those services.

It is clear to NGA that the current focus of antitrust on consumer welfare is insufficient. I would submit a redirection of the federal antitrust policy that is committed to the maintenance of consumer choice by preserving diversity in the marketplace which would surely ensure the equality of opportunity for all.

Thank you for this opportunity, and I welcome your questions and an opportunity to provide examples.

CHAIRPERSON GARZA: Thank you very much.

Professor Hovenkamp?

MR. HOVENKAMP: Thank you. My name is Herbert Hovenkamp. I'm the Ben V. and Dorothy Willie Professor of Law and History at the

University of Iowa. I am also the surviving author of the *Antitrust Law* treatise begun in the 1970s by Philip Areeda and Donald F. Turner. Volume 14 of that treatise is devoted mainly to secondary line enforcement of the Robinson-Patman Act.

I have no current clients involved in Robinson-Patman litigation, nor am I representing any interest group that has some interest in the outcome of these proceedings with respect to the Robinson-Patman Act. My interests are motivated solely by my desire that the corpus of the federal antitrust laws be dedicated to encouraging efficient and competitive markets.

The balance of my opening statement offers very brief answers to the questions you have posted concerning the Robinson-Patman Act, and then of course I welcome any questions you may have for me later on.

What are the benefits and costs of the Robinson-Patman Act? Does the Act promote or reduce competition and consumer welfare? My answer is: As currently enforced, the Robinson-Patman Act

is a socially costly statute that produces no benefits to competition that could not be secured by means of litigation under the Sherman Act. At the same time, the statute imposes significant costs on manufacturers who depend on networks of independent dealers.

While judicial enforcement of the statute is not as anticompetitive as it once was, the statute continues to make it costly for a firm to reward its more aggressive dealers or to invest more resources in them, in the process discriminating against less-effective dealers. Both the amount and the cost of Robinson-Patman litigation has diminished considerably over the last two decades, thanks in part to Supreme Court decisions that have attempted to bring the interpretation of the statute more in line with that of the antitrust laws generally. Nevertheless, in 2004, 10 circuit decisions and 22 district decisions included discussion of Robinson-Patman Act claims. 2003 numbers are roughly the same.

What purpose should the Robinson-Patman

Act serve? The only situation in which the Robinson-Patman Act can reliably serve to promote competition is the one that was of most immediate concern to its framers, namely, the powerful buyer/reseller who forces a supplier to discriminate against rival buyers/resellers contrary to the supplier's independent judgment.

Unfortunately, the statute has completely lost its historically intended focus on buyer pressure, and the Supreme Court has made buyer's liability under Section 2(f) of the statute almost impossible to prove. Moreover, any anticompetitive assertions of buyer pressure could be remedied under the Sherman Act.

Your supplemental questions ask whether the current approach to interpreting the Robinson-Patman Act reflect the increasing role of economic analysis in antitrust. My answer is: Somewhat, but not nearly enough to rehabilitate an economically harmful provision.

Should the Robinson-Patman Act be repealed or modified, or its interpretation by the courts

altered? My answer is that as a matter of competition policy, the Robinson-Patman Act is completely unnecessary and should be repealed. That may not be a politically practical solution, however.

Please identify specific changes and explain why they should be adopted. For example, should private plaintiffs asserting Robinson-Patman claims be required to prove antitrust injury, that is, proof of injury reflecting the anticompetitive effect of the challenged conduct? My answer is that that's a sensible requirement of antitrust injury as properly defined. In the *Truett Payne* case the Supreme Court assessed an antitrust injury requirement but referred only to the way in which the damages are measured, and *Truett Payne* has been interpreted to require a showing that the disfavored purchaser was injured in its ability to compete with the favored purchaser. The Supreme Court will very likely return to this issue next term in the *Volvo v. Reeder-Simco* case.

Should the inference of harm to

competition recognized in *Morton Salt* be modified by, for example, requiring plaintiffs to make a showing of harm to competition? My answer is that the *Morton Salt* inference was never properly one of injury to competition at all, and to that extent, it should be upset.

Does limiting the substantive provisions of the Robinson-Patman Act to the sale of commodities make sense in today's economy? Clearly, price discrimination and the delivery of services is more ubiquitous than is the sale of goods, and to that extent the Act's limitation to commodities makes little sense. However, expanding the scope of the Robinson-Patman Act so as to make it reach business services would only increase the social cost of an already socially costly statute.

Third, collateral issues raised under such an expansion would produce a litigation nightmare. For example, how would the "like grade and quality" requirement apply to legal services, accounting services, medical services and the like?

Finally, what role should buyer market

power play in applying the Robinson-Patman Act? The historical concern of the Robinson-Patman Act was the power of large buyers and the exercise of buyer power. The result is higher margins at the retail level. Such practices are presumably contrary to the independent wishes of the manufacturer who profits when its distribution chain is operating as efficiently as possible. A Robinson-Patman Act concerned with true injury to competition would focus predominantly, if not exclusively, on buyer power. At the same time, however, an exercise of buyer power that genuinely caused competitive harm could be remedied by either Section 1 or Section 2 of the Sherman Act.

Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Saferstein?

MR. SAFERSTEIN: Thank you for inviting me to share my views on the Robinson-Patman Act this morning with this distinguished Commission. I hope that this is not one of the 20 topics that Commissioner Jacobson did not want to talk about

this year.

As I looked over the prepared remarks and comments that were submitted, I was struck by a number of areas of agreement among the commenters, specifically the repeal of the criminal provision, Section 3, and the need for greater flexibility for the cost justification defense.

As I see it, there are still four key questions that need addressing. The first question is: Should the Act be repealed? While I understand the arguments for repeal, I disagree, in part because I think the Act still has some purposes that can help small businesses and our economy. Moreover, I fear that repeal could bring a rise in state price discrimination laws that could prove more troublesome, especially without the guidance and cover of the Robinson-Patman Act. I, like others, am also concerned about the ability of Congress today to deal with this contentious topic and arrive at results that do not make matters worse.

The second question we face is: Should

the Act be reformed to make it more restrictive in terms of how secondary line plaintiffs prove their cases? In general, there are a variety of proposals involving standing, *Morton Salt*, *Brooke Group*, many of which were posed in the questions by this Commission, all of which would really come down to requiring that the plaintiff in a Robinson-Patman Act prove a full-blown competitive injury case.

In Professor Hovenkamp's views, with which I agree, this requirement would be a *de facto* repeal of the Act. That is, it would be a rare Robinson-Patman plaintiff that could prove general competitive injury by virtue of the price discrimination on a single brand or line of products. It is one thing for a plaintiff to show, as it must under current law, that the plaintiff will be injured; it is quite another to show general competitive effects. Thus, I remain troubled by such proposals.

The third question we face is, should the Act be reformed to make it easier to sue power

buyers? Many propose this, and it does make some sense, especially since plaintiffs complain that they cannot effectively bring cases against power buyers under the current state of the law, and these are the people who are the real targets of the Act. If this could be done within the current laws and without the involvement of Congress, it might be an interesting proposition. As I state in my testimony, currently the burdens of compliance and litigation are borne primarily by the sellers and not the buyers, and that does seem a little unfair and out of balance, given the nature of the law.

The fourth and final question which I have posed for today is something that's a little bit off my testimony and maybe something that may depart a little bit from my colleagues, which is, are we sure we know enough to take major action? I am not confident that we really know enough about the effects of the Act in today's marketplace, positive or negative, to make radical changes or repeal it. Many people would like to give some kind

of assistance to small businesses, yet we are not sure that the Act really does it. How are small businesses actually doing? What do they really need?

We assume they need price parity, but is that really the case? Most people assume that the Act has had compliance costs and negative effects on vigorous competition. I am one of those who tends to believe anecdotally that that's the truth. But how does it really work in practice, and have the Wal-Marts and the Costcos, the Home Depots, the Lowes and the Staples really been slowed down by the Robinson-Patman Act?

And finally, what is the effect of the internet on all of this? We have had a drastic change in marketing since the passage of the Robinson-Patman Act almost 70 years ago.

In short, I think we may need some more information before taking major action. Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Spiva.

MR. SPIVA: Thank you. Good morning,

Commissioner Garza and the rest of the Commission. My name is Bruce Spiva. I'm a partner in the law firm of Tycko, Zavareei, and Spiva, and it is my pleasure to be here today to testify on behalf of the American Booksellers Association.

Founded in 1900 the American Booksellers Association is a not-for-profit organization devoted to meeting the needs of its approximately 1,800 members of independently owned bookstores with retail outlets through advocacy, education, research and information dissemination. The ABA actively supports free speech, literacy and programs that encourage reading. On behalf of the ABA, I would like to thank the Commission for inviting the Association to submit written comments and to testify today.

In the past 15 years there has been a precipitous decline in the number of independent bookstores serving the public. Independent bookstores have been forced out of business by superstore chains and other large book retailers and mass merchandisers whose rise has been fueled,

we believe and have alleged in litigation, by illegal purchasing terms. In response, the ABA and a number of its courageous members have been forced to litigate a series of lawsuits in an attempt to level the playing field and give independent bookstores a chance to survive and continue serving their communities. These lawsuits have been both on the seller side against publishers, and more recently on the buyer side against chain bookstores. While the playing field is more level than it used to be, due in large part to the Robinson-Patman enforcement actions pursued by the ABA, large retailers still enjoy a significant advantage in purchasing terms.

But despite the limitations of the Act, difficulties in enforcement that were created in part by the Act itself and in part by some judicial interpretations of the Act, the Act has made a difference to independent bookstores, and for many, the improved terms achieved through the enforcement action has meant being able to continue in business when they otherwise could not have.

The American Booksellers Association believes the enforcement of the Act has been good for consumers because it has helped preserve the diversity in the selection and promotion of books provided by independent booksellers, and enforcement has helped some bookstores in small communities with one or few bookstores continue to serve those communities.

When we speak of diversity of selection of books, we are talking about the diversity that comes from thousands of independently owned outlets making independent decisions about the inventory that they carry. Unfortunately, the loss of thousands of independent bookstores in the United States over the past 15 years also has meant the loss of thousands of store book buyers making such independent decisions about which books to purchase from publishers and to offer in their stores.

Perhaps even more importantly, independents have traditionally played a critical role in promoting new and untested authors and in putting their works directly in the hands of a

customer base that many of them know personally, a practice that independent booksellers call “hand selling.” As a chain store executive reportedly put it, "Independents are the on-ramp for new ideas, new authors, new trends." More and more of those on-ramps are being closed.

While the reduction in the number of independent stores may not have yet affected the number of titles being published, it has created an impediment to new books by new authors or books that may not be supported by huge advertising budgets getting noticed and sold. In addition to helping to stem the loss of independents and the consequent loss of diversity of selection and promotion of books, the Robinson-Patman Act also serves the goals of preserving pluralism and democratic ownership of the means of distribution, particularly in the bookselling and publishing industries whose “product” is the dissemination of culture and ideas.

These policy goals are complementary to consumer welfare, which should not be conceived of

narrowly as concerned only with price, but also with important other consumer values such as choice and service and innovation, and which clearly were of concern to the Congress that enacted the Robinson-Patman Act as well as the earlier antitrust laws.

If the Act were abolished or significantly narrowed, the large book retailers would inevitably dictate prices to publishers, and the gap in purchasing terms between large and small retailers would widen so much that a larger number of the remaining independent bookstores would go out of business. The country would then lose the diversity and the selection and promotion of books provided by independent bookstores, and many communities too small to support chain superstores would lose their only bookstores.

Were the retail landscape populated by only a few large retailers, it would have a disastrous effect on the dissemination of culture and ideas in America.

Thank you.

CHAIRPERSON GARZA: Thank you.

Commissioner Litvack?

MR. LITVACK: First, let me, on behalf of the Commission, thank each of you for your statements and your summaries this morning. They are really very helpful to us. I do have some questions that I think you could be helpful on, and I would like to address them to you.

Mr. Campbell has answered this question, but one of the threshold questions, at least in my mind, is whether or not the Robinson-Patman Act is necessary. Is it protecting something that isn't otherwise protected? Mr. Campbell said that, yes, it is by itself an important statute that accomplishes a goal not otherwise addressed.

But if I understand Professor Hovenkamp correctly, he thinks that whatever ills there may be as a result of buyer power or otherwise may be addressed by Sections 1 and/or Section 2 of the Sherman Act.

Professor Hovenkamp, could you just amplify how Section 1 really addresses the kind

of things Mr. Campbell and Mr. Spiva are talking about?

MR. HOVENKAMP: Well, if there's a real restraint of trade, a real restraint that results in higher consumer prices, reduction in output, reduction in quality, and an agreement, it would of course be addressable under Section 1 of the Sherman Act. And then the question is, is there any residual that the Robinson-Patman Act picks up that the Sherman Act cannot already address? And I think the answer is probably not. I mean, the way the Robinson-Patman Act has been pled--and it's been religiously protected, particularly by the plaintiffs' bar--injury to competition is simply not an element of a secondary line Robinson-Patman Act claim.

The cases would be pled differently if that requirement were part of the statute, so I think I disagree with the notion that inserting the requirement would change or kill Robinson-Patman Act enforcement, but my point is that this an antitrust statute, right? It's defined as an

antitrust statute by Section 1 of the Clayton Act. It's subject to actions for damages under Section 4 of the Clayton Act. It is the only provision for which we do not require proof of injury to competition, neoclassically defined--the way we ordinarily define competition.

That can be true for one of two reasons. One is that we think it's obvious that such injuries occur whenever there's a qualifying price discrimination. I don't think anyone believes that. The other is that we're simply not concerned about injury to competition in this case, and then my answer is, such a concern that falls outside of our concern with injury to competition has no place within the antitrust laws.

MR. LITVACK: That really is what it comes down to, isn't it, from your standpoint? That, to the extent that the Robinson-Patman Act addresses issues that are particular to an individual retailer or what-have-you, but do not demonstrably adversely affect competition--your point is that we just shouldn't be concerned about them?

MR. HOVENKAMP: Not as an antitrust matter, correct.

MR. LITVACK: Correct.

Mr. Spiva, do you want to comment on that?

MR. SPIVA: That strikes me as an article of religious faith just as much as those who argue that other values should be of concern to the antitrust laws. I mean, certainly both the framers of the Sherman Act and certainly the Robinson-Patman Act had other concerns in mind than those concerns that are addressed when a plaintiff is able to make out a classic injury to competition case. I mean, I could say, certainly for the litigation that the ABA has been involved in--and I've been involved in it since 1994 when the first lawsuits were brought—they could not have proved injury to competition to the market as a whole in the way that it's been interpreted over the last 20 years, and yet, I think that the Act has served the purposes that its framers intended, which was partly protection of

small businesses, partly protection of choice for consumers. There is a quote from one of the congressmen at the time the Act was passed, that it's intended to catch "the weed in the seed."

No, we can't make out a case of injury to competition in terms of the market shares that we'd need to show for that. But there's real harm that we can point to that--I think we go into greater depth in our written comments--which was properly of concern to the Congress that passed the Act and I think these concerns are still vital today.

MR. LITVACK: I think Mr. Campbell says that we should really consider redefining the purpose of the Act from consumer welfare to the preservation of diversity, and the question that occurred to me is, is that a goal, in and of itself, preserving diversity, and is that really inconsistent with consumer welfare? Is that just another example of it or another word for it?

MR. CAMPBELL: I think it would be very easy for any of us to get wrapped in legal and economic theory, and I come from a different bent.

I'm in the real practical world of buying and selling products, and I have been denied the opportunity to buy a product I wanted to sell, pure and simple, and yet my company, as small as it is, is plenty large enough to buy in our business--and I can't speak for the book business--but in the grocery industry there is nothing larger than a trailer load of product. Even Wal-Mart buys in a trailer load. That is the efficient, economic, order quantity, and I have been denied the opportunity from manufacturers to buy a certain item, because I have been told that that item was strictly for discounters or for a class of trade.

So that is definitely a restraint of Trade, and we are at a competitive disadvantage because it should be an open marketplace where at least I can succeed or fail in the marketplace. But if I can't have access to the product, if I can't have access to certain packaging of that product or the promotions of that product--all the documentation I've seen today that we read about all dealt with price, but there are ways to discriminate other

than price. If you can't even have access to the product, or to the packaging of the product, or to the promotion of the product, price becomes irrelevant anyway.

To try to totally talk about the way it works in theory versus the way it works in the marketplace is what I'm alluding to. Diversity in the marketplace is the opportunity to succeed and to be able to provide an offering that the consumer desires.

MR. LITVACK: Since you mentioned price, let me just ask you, what is the test in your mind, or what should the test be, if I want to buy a product at a lower price?

MR. CAMPBELL: An objectively determined price. Tell me what the criteria are; if I have to buy five truckloads to get a certain price, then I know what the game is. But I don't like finding out about it two months later or a month later, because that puts me at a competitive disadvantage.

MR. LITVACK: You're okay if it's five trailer loads even though you only want or need or

could use two?

MR. CAMPBELL: That's exactly correct. I need to know the rules of the game, and unfortunately, the rules of the game are not always promulgated by the seller in a timely fashion and/or with objectively determined criteria.

MR. LITVACK: You also make the statement--and I'm going to ask others to comment on it--talking about your industry, and you say the retail grocery industry is the most concentrated ever. What has the effect of that been, and what's the evidence of that effect? Is it less competitive today?

MR. CAMPBELL: What has occurred in that--well, let's back up. We know where we are today. There are roughly five retailers that have approximately 50 percent of the market share today, and that's Wal-Mart, who sells groceries, and the four large chains that are located in the continental United States. They have roughly 50 percent of the market share. The real question is, how did they get there? I submit to you that,

through mergers and acquisitions, they got there with the desire to become power buyers, because of what Wal-Mart was able to achieve. And then how was Wal-Mart able to achieve that?

I've been in our industry long enough, over 30 years now, and I was there before Wal-Mart was in the grocery business. They were strictly in the discounting business of selling lawn chairs, radios, clothing, *et cetera*, *et cetera*. But periodically you would see grocery items in a Wal-Mart. We would go and see packaging that was never offered to us in the grocery business for the same item, whether it was a juice, or whether it was a toilet tissue or facial tissue or something like that. We'd go to our manufacturer and say, "We would like to buy some of that. We think it might sell." They would respond, "It won't sell in your stores. We only sell it to this class of trade."

And they hid under the class-of-trade criteria, which we have now learned and understand

is not a proper classification or a reason to discriminate in the marketplace. But what that did was funnel the consumer to that location because that's what the consumer wanted; they wanted the larger pack; they wanted the club pack; they wanted it bundle packed; and we couldn't have it.

So what did it do? The consumer was funneled to the retail outlet that had it, which happened to be a discount store and/or a chain store, and so you saw market concentration. And then as market power grew through the buyer process, then you saw Albertsons taking over American Stores, Kroger taking over Fred Meyer, and the various other consolidations taking place to achieve market dominance through power buying, not necessarily efficient buying, power buying.

MR. LITVACK: Let me turn and ask Mr. Saferstein, because you have represented, do represent and do advise companies in this area. Talk to us a little bit about what the costs are. I mean, we keep hearing what the benefits may be and

what they may not be. Professor Hovenkamp referred to the costs. What are the costs?

MR. SAFERSTEIN: Probably two types of costs go into this. One is the sort of legal costs of making sure you're in compliance, setting up the system, setting up the systems for tracking competing offers in the event that you want to make discounts based upon a competitive offer. You have to keep track of those and have a system for that. Training the salespeople, which you have to do periodically and rigorously to make sure they understand it. Those are all a fair amount of sort of the legal costs that go into it.

The other type of costs we talked about are sort of the market costs of changing the way you do business to comply with the Robinson-Patman Act, and I think that's what economists worry about more, which is whether people are changing their methods of distribution.

For example, we thought--and I'm not sure I'm correct, having heard Mr. Campbell--we typically thought that sort of these major bulk packs were

things that were done by sellers to comply with the Robinson-Patman Act, for lack of a better word. That's why they came up with these jumbo packs on the theory that, therefore, there couldn't be price discrimination. I did not know, I don't think, that they were not necessarily being sold to all comers. My assumption was they were being offered, but typically the smaller retailers would not or could not take them.

But in any event, that's an example of manufacturers and sellers changing the way they do business, which economists would argue is perhaps inefficient and not the most efficient way of doing business and distributing the products that they are because of the Robinson-Patman Act. So those are the two types of costs or burdens we talked about.

MR. LITVACK: You alluded to the legal cost of documenting, trying to maintain a meeting competition defense, maybe cost justification. It inevitably leads, at least in my mind, to the question, which I throw open to any one of you, are

any of these defenses worth having? Are they real defenses? Are they being sustained? Can they be sustained? Is it worth the cost? Mr. Spiva.

MR. SPIVA: I can tell you from someone who has approached it from the plaintiff's perspective, they are very real defenses, and they are difficult to defeat, particularly in a buyer-side case where you have to prove not only that the price given was not cost-justified, was not given on a meeting competition basis, and depending on what the judge's interpretation of the Act is, whether it's a functional discount. You also have to prove that the buyer knew that none of those defenses applied. That's almost an impossible hurdle to clear. It's not impossible, I will say, and obviously the ABA took it on and has had some success. We have not ever gone to final decision on any of those issues, although each of those has been an issue in the cases that the ABA has been involved with. But they are real defenses.

MR. LITVACK: Do you agree?

MR. SAFERSTEIN: Yes. I agree that the

meeting competition defense is actively used both in planning and has been successful in litigation, and as I think we've all pointed out, the cost justification defense, while on the books, has not been as effective, either in terms of planning or in litigation, and I think a fair amount of commenters would argue that the courts, the Federal Trade Commission or somebody should try to make the cost justification defense more flexible, because one of the purposes of the Robinson-Patman Act is not to disincentivize and not to punish more efficient buyers. I think we all agree that if it's efficiency, it ought to be recognized, and we worry that the current state of the cost justification defense doesn't adequately address that.

MR. LITVACK: You, to the contrary or unlike Professor Hovenkamp, seem to think that the Sherman Act is inadequate to address the problems posed by Robinson-Patman violations. Can you tell us why?

MR. SAFERSTEIN: Actually, we don't disagree I don't think. It's a semantic problem.

If the Robinson-Patman Act is interpreted as it currently is, without a full-blown requirement of competitive injury, then I think Professor Hovenkamp agrees with me that the Robinson-Patman Act then catches many things that the Sherman Act doesn't. It's only if you agree that there should be a full-blown competitive injury requirement in Robinson-Patman that it then becomes almost superfluous because it's the same as the Sherman Act.

MR. LITVACK: Do you agree with that, that there should be a competitive injury test?

MR. SAFERSTEIN: I'm troubled by it. As I say, I think that would be--and here I agree with Professor Hovenkamp's testimony where he said that would be--I think he said "*de facto* repeal of the Act" because there would be few plaintiffs who could ever meet that kind of burden of proof. And so I disagree that we should go that route at this point.

MR. HOVENKAMP: Can I add a word?

MR. LITVACK: Please.

MR. HOVENKAMP: I think it's important to keep in mind here that we're living in an age in which competitive injury is not an element, and as a result, lawyers don't plead it, and they don't seek evidence of it. I think it's a little premature to think that if a competitive injury requirement were imported into the Robinson-Patman Act, the claims would go away. We would have a period--and it might be a relatively long period--in which plaintiffs would look for ways to plead and prove competitive injury, and I assume there would be fewer cases, but I wouldn't assume automatically that it wouldn't be provable simply because we haven't proved it in the past.

MR. LITVACK: Let me come to one issue, which certainly Mr. Campbell has addressed and Professor Hovenkamp had addressed as well, and that is the question of whether or not Section 2(a) should cover services, whether it is sufficient to limit it to commodities. I guess the question--Mr. Campbell is saying yes, it should be, and citing the one example of the credit and debit cards.

Professor Hovenkamp is saying that there are a myriad of issues of things being of like grade and quality, citing something as to which there is no like grade and quality, such as legal talents, and other similar things.

So let me ask you, Mr. Spiva, which side of the ledger do you come down on?

MR. SPIVA: On the services issue, we actually do not take a position on that issue.

MR. LITVACK: You're totally mute, so you don't care.

MR. SPIVA: I mean, it's not that I don't care, but given that we're here to give some perspective from our industry, and although there are some service issues, books do clearly fall within the goods realm. We haven't formulated or developed a position on whether coverage of the Act should be extended to services

MR. LITVACK: Mr. Saferstein?

MR. SAFERSTEIN: I come down on the side that we should keep it to commodities. We've got enough problems without trying to figure out what it's like in services for like grade and quality.

MR. LITVACK: How would you deal, Mr. Campbell, with the variety of services that Professor Hovenkamp alludes to and Mr. Saferstein has now? I mean you mentioned the one, and I understand that, but there are obviously a myriad of other services.

MR. CAMPBELL: I think it obviously would require some very technical definitions of what would be considered commercially required services for a business entity in today's cashless or soon to be cashless type of economy, where we are encouraging debit and credit transactions for the safety features and the security features associated with that. The unfortunate thing is, there's only one service provider available to do that for interchange activity, and everyone is being forced to use that. And yet there is no price parity at all, and there's no economically based reason for the varying rates that are charged to the user community. So you end up with a power buyer situation and a user framework.

MR. LITVACK: You talk about the power

buyer and the whole standard for injury, is *Truett Payne* the right standard do you think? Mr. Saferstein; you cited it. Is it?

MR. SAFERSTEIN: *Truett Payne* I think is the correct standard for proving damages.

MR. LITVACK: Damages, that's what I meant; yes.

MR. SAFERSTEIN: It's had a major impact in terms of Robinson-Patman cases. I think it makes it quite difficult to have a Robinson-Patman case, since--it goes without saying there's no government enforcement--so all we have is private enforcement, so a private treble damage plaintiff has got to look at the case and what they can prove. They know they have to prove actual lost sales, actual injury. So therefore, I think we've seen the disappearance of enforcement in cases--and actually, that's why I'm interested in the testimony.

We've seen, I think, a lot of absence of cases where you have a lot of small products in large stores where you would think it would be

difficult to prove any kind of injury for discriminatory pricing, salt, for example, or any of the millions of commodities that appear on a grocery store shelf. But I do agree with the decision. I think it was the proper decision, but I think it has had a major impact on the kinds of cases we see, and, therefore, the industries in which we see enforcement of the Robinson-Patman Act.

MR. LITVACK: Thank you.

Madam Chairman, no further questions.

CHAIRPERSON GARZA: Thank you.

Commissioner Burchfield.

MR. BURCHFIELD: Thank you, Madam Chairman.

Also, thank you to all the panelists today. I read each of your statements with great interest and appreciate the thoughtfulness and the work that went into them.

Let me start with Mr. Spiva and ask you if you could elaborate a little bit upon the history, and, in your view, the effectiveness of the

litigation the booksellers have engaged in under the Robinson-Patman Act, and explain to us if you think the litigation was effective, whether you can reconcile that belief with the decline, continuing decline, of the number of independent bookstores in this country?

MR. SPIVA: Yes. Thank you, Commissioner. Just first, the history, and I can tie it in with the Association's continued belief in the effectiveness of the Act, although I believe that it has its limitations, to say the least.

The booksellers brought suit against five medium size to major publishers in 1994 and later added a sixth, which was the largest publisher in the country at the time. This litigation followed on a litigation that the FTC had brought in the late '80s against the biggest publishers in the country, alleging pretty similar practices. That litigation kind of dragged on for a period of time.

It was reported in the press at the time that there was a stalemate within the Commission, and ultimately, the Association conducted an

independent investigation prompted by complaints, from its members, and discovered that the types of practices that the lawsuit ultimately complained about were pretty rampant, large discounts for chain retailers and mass merchandisers that did not appear to have any efficiency justification. There's an example that I put in the comments. It was pretty standard.

In the publishing and bookselling business there are published terms. The ABA itself actually puts together a handbook of prices that it gets from the publishers on a yearly basis. At that time it was pretty standard in those published terms to have pretty steep discount schedules. If you buy 10 books, you get 40 percent. If you buy 20 books, you get 41 percent, *et cetera*, and there would be a huge leap usually between the realistic range that an independent could typically buy at, and the range that you would essentially have to be a Fortune 500 company to buy at, and there was a pretty big difference in discount that went along with that.

It didn't appear to have any efficiency justification because oftentimes, in fact, probably more often than not, the chains received those books at each of their individual stores, drop shipped to their stores just as an independent would, and it wasn't that 3,500 books were being delivered to one location and then being redistributed by the chains.

Just as an example, the other area where the association found abuse was in promotional allowances. There were huge payments for placement of what became best sellers. Oftentimes they were kind of marketed as best sellers, and if you put $20,000 to put it in the front of the store, lo and behold, it becomes a best seller. But in any event, these were things that were not even published, were largely unknown to independents so that they could compete to get, even though it would be a small amount, a proportional share for doing something similar in their stores.

So given the length of the FTC proceeding, the fact that nothing was coming out of it, that

these practices they were finding were happening in the marketplace, and in their stores, the ABA stores, member stores, were going out of business in increasing numbers in the early and mid '90s. They felt compelled to bring suit to try to stop it.

Shortly thereafter the FTC actually decided to drop its suit without making a decision one way or the other. It cited the ABA's litigation as one reason that it felt that it was unnecessary to continue to expend resources, and ultimately, the ABA settled with the six publishers against whom it had brought suit.

MR. BURCHFIELD: Let me cut you off. I'm sorry.

MR. SPIVA: Sure.

MR. BURCHFIELD: Under the protocol here the lead questioner has much more time than the subsequent questioners, so I'm actually down to less than a minute now.

MR. SPIVA: Okay. I can cut to the chase then. Bottom line, a couple years later, there was litigation by the ABA against the chain booksellers

because they felt that they had not really narrowed the gap, and in the end all of these cases were settled. In the marketplace what we see is, the independents have had the opportunity to get a better discount, to have available to them some of these promotional opportunities. And although thousands of them have gone out of business, since that has happened (the leveling of the playing field, it appears that there's a leveling off of the number of independent bookstores going out of business. I can't say that all of that is due to the better discount terms.

What I can say though is, given that, on average the margins are very thin--in fact, I think the average bookstore, independent bookstore, operates at a slight loss--but the increase in discount that we have seen across the board has made the difference for many stores between being able to stay in business and serve the public, and not.

MR. BURCHFIELD: Thank you, Madam Chairman.

CHAIRPERSON GARZA: Thank you.

Commissioner Carlton.

MR. CARLTON: Thank you. I too want to thank all the panelists for coming. I appreciate all your hard work in preparing the statements. I have just a few questions since I only have a few minutes.

This is directed to Mr. Campbell and Mr. Spiva. In your testimony you talk about power buyers. My question is, is it your contention that, if we focused on these power buyers and looked at their margins—say, their retail price of a book minus the wholesale price of a book, or in grocery stores--is it your contention that the margins are lower or higher for the power buyers?

MR. CAMPBELL: To me it's not an issue of their margins. That's an operating decision that you make to run your business.

MR. CARLTON: That's the only question that I want though. That's my question.

MR. CAMPBELL: That's not my concern.

MR. CARLTON: Okay. Mr. Spiva?

MR. SPIVA: Yes, I think so. If I understand your question correctly, yes.

MR. CARLTON: The margins are higher for the large chains?

MR. SPIVA: Yes. You're saying the price at which they purchased the book--I'm sorry--the price at which they sell the book, minus the price at which they purchase it.

MR. CARLTON: Yes. So their per unit profit is higher per book.

MR. SPIVA: Yes.

MR. CARLTON: Second--and this is directed to Mr. Campbell, to Mr. Spiva, and to Professor Hovenkamp. One of the concerns that you raise is that power buyers presumably get a lower price. They could drive out of business, as you've indicated, the smaller bookstores or maybe small grocery stores, and then they could raise the price. Are there any systematic studies showing that as, for example, bookstores, large chain bookstores, have penetrated a market, or in areas of the country where they're more important, that book prices are lower, or grocery prices are lower, or are they higher? Are there any systematic studies

showing that these large chains, whose competition you're concerned about, have resulted in higher rather than lower prices?

MR. SPIVA: Well, I do want to first just clarify that I'm not making a predatory pricing type claim about the pricing practices of the chain superstores or the mass merchandisers for that matter.

Just to answer your question, the price of books in general has gone up. The publishers have raised on an average basis the list price for books. The way that books are sold to book retailers is a discount off of the list price typically, and it's widely reported that the large chains, although they've created a perception of lower prices to consumers, actually have quietly gotten rid of most of the discounts that they initially gave, which would mean--and again, I can't make a--I'm not trying to make a predatory pricing claim, but it would mean that actually, for those books for which there is no longer a discount, the price is higher than it would have been. I

don't know if I can draw the causal link between the publisher raising the list price and the larger discounts that it gives to the chains, but certainly that's a widespread belief, I think, and it probably is fair to say--

MR. CARLTON: I'm just curious whether there are any studies showing that that's actually occurred.

MR. CAMPBELL: We do market studies for our customer base, and we'll do them in varying markets, and where you have a very competitive marketplace the pricing is lower. When you have fewer competitors, larger competitors in a marketplace, the retail pricing on the same items are higher.

MR. CARLTON: Professor Hovenkamp, are you aware of any such studies?

MR. HOVENKAMP: I'm not aware of any studies.

MR. CARLTON: Several of you--I'll direct this to Mr. Saferstein first. You were asked a question about competitive injury and whether that

should become a requirement of Robinson-Patman, and you said no. If for some of the reasons we heard, competitive injury is deemed to be too narrow because it doesn't include diversity or service, but that causes harm to consumers in some way, why doesn't that impact not just the Robinson-Patman Act but all of the antitrust laws? In other words, shouldn't every antitrust violation be concerned about these topics that are other than what we've narrowly defined as competitive injury, if they're important for the Robinson-Patman Act?

MR. SAFERSTEIN: Well, let me tell you, none of us I think have said that competitive injury isn't an element of a Robinson-Patman case. It's just that under *Morton Salt*, the way the Supreme Court has defined it for purposes of a secondary line case, it's pretty narrow proof that gets you there, and so the argument has become, do you want to turn that into a full-blown competitive injury case, *a la* Sherman Act Section 1 rule of reason case?

The question is, shouldn't that be a

concern of all antitrust laws? I guess the answer is, generally speaking, yes, which is why we're concerned about it, and the problem is that for Robinson-Patman--and I understand Professor Hovenkamp's caveat about what might happen--I think most of us believe that if you required private Robinson-Patman plaintiffs to make a full-blown Sherman Act rule of reason competitive injury requirement, they couldn't do it, they couldn't make it. So then it becomes a policy choice. Do you make them do it and probably end up dumping secondary line cases the way it's happened in primary line cases? We all know that the primary line cases have basically died for the same reason, which is that the Supreme Court has said you've got to make a full-blown showing of competitive injury.

MR. CARLTON: Yes, and I'm trying to figure out whether that's good or bad. In other words, I understand it would make it hard to bring an R-P case if this requirement of competitive injury is broadened to be what it is under the antitrust laws, but it seems I'm just reversing the

question, which is, if this is such an important requirement to have harm to a competitor as competitive injury, that would seem to apply to our antitrust actions, and I'm wondering, why should we single out the Robinson-Patman Act? Should this Commission say all of the antitrust laws have much too narrow a focus, because we've taken a look, by example, at Robinson-Patman?

MR. SAFERSTEIN: I don't know that anybody would encourage you to take the Robinson-Patman law and import it into the Sherman Act, but I think the reason it's done, as I say in my paper, is that we have made a policy choice that the purpose of the Robinson-Patman Act is slightly different than the general antitrust laws, and one of those purposes is to protect small business, and, for that reason, we have given them a leg up when it comes to proving competitive injury.

MR. CARLTON: One final question also to you, Mr. Saferstein. As I understand your main reason why you were reluctant to repeal the Robinson-Patman Act, it's that you say there will

be a consequence; perhaps the states will enact their own laws. Would you just elaborate a little bit on that, on those fears?

MR. SAFERSTEIN: Well, I think there are two fears if you talk about repeal. One is that you're worried about Congress getting involved at all, given the contentiousness both of the Robinson-Patman Act and of Congress these days, and you also worry about the state laws. There are many state laws on the books already. They're not widely enforced; they're not widely used. But with the absence of the Robinson-Patman Act you probably would see an increased use, and, as I say, the Robinson-Patman Act is used to interpret a number of these state laws. When that disappears and when the federal court interpretation of the Robinson-Patman Act--which is consistent with modern Chicago school of economics learning, when that disappears, you might have state court sort of unleashed, for a lack of a better word, and you might get a bigger mess than you counted on.

MR. CARLTON: Thank you.

CHAIRPERSON GARZA: Commissioner Delrahim had to leave to take a conference call, and Commissioner Yarowsky has a commitment on the Hill, so we're going to turn to you if that's all right.

VICE CHAIR YAROWSKY: I want to commend your testimony, and I also want to commend the working group and the staff for having put together such a vibrant panel with different points of view who can all well articulate them. What I think I'll do to try to use the five minutes efficiently is maybe pose two questions, and then we'll see how much we can hear your answers in that time.

One, from all your different perspectives, wouldn't clarification--even though some folks don't want to change one word and others would like to repeal the whole statute--the wiser course here, if we can settle on how to clarify various things, rather than the *status quo*? We seem to have the worst of all worlds. One, the courts seem to be revising legislative intent on their own to try to make it work in a modern world; two, the relevant enforcement agency is not bringing any

cases; three, the Act doesn't seem to apply to the new economy that we live in; and four, ironically, having this Act in place is in some ways a stabilizer, even with all the other controversy based on what we've heard from a number of witnesses.

That would be my first question, if we could clarify it, wouldn't it be better than leaving the *status quo* or repealing it?

Second, I was interested in your testimony in terms of its implications on merger analysis. Certain horses are out of the barn, so we can't change those facts on the ground. But already, other power buying issues have come up, not in the context of grocery stores or books; it's happened in health care. The FTC in this building actually conducted a workshop because of certain group purchasing organizations, and the hospitals, that have raised some issues. There were some health care antitrust guidelines. Actually, there's a movement to at least reconsider them for just those reasons that would have implications for

mergers and other types of enforcement actions.

Those would be my two questions, one, wouldn't it be preferable to clarify rather than repeal or stand pat; two, what are the merger implications of power buying and should we look into that as well?

MR. CAMPBELL: I would just like to go back to the original Act in 1936, and the words used were "to restore." The implication of restore means you have lost something; let's restore equality of opportunity. That's all I would like to see happen in 2005, restore equality of opportunity. Opportunity implies an open marketplace where you can enter and succeed and fail on your own. If you are denied the opportunity to get the product, denied the opportunity to get the packaging, denied the opportunity to get the promotional allowance, denied the opportunity to get the objectively determined price and/or the flexible payment terms and you have no knowledge of them, how do you have equality of opportunity?

That would be my focus. And I would say keep the Act and tweak it such that you do truly restore equality of opportunity.

VICE CHAIR YAROWSKY: Professor?

MR. HOVENKAMP: I would think a simple amendment of the statute. I've suggested some amending language in my testimony that would require an injury to competition analogous to the requirement we currently assess under the Sherman Act; that would be a big improvement. It raises the objection from Mr. Saferstein that once--and I think he's correct--once we did that, the coverage of the Robinson-Patman Act probably wouldn't be bigger, certainly not bigger than that of the Sherman Act, but it might be politically expedient to make an amendment of a few words in the statute rather than to repeal the whole thing.

The buying issue is very troublesome. The Robinson-Patman Act is a statute that governs intra-brand restraints, where we think, as a principal matter, most such restraints are efficient, but there's one troublesome group, and

that is where a dealer or reseller with power can force a supplier to impose higher costs on rival dealers. And I think it raises the issue of driving them out as Commissioner Carlton mentioned a while ago. I think it also raises the possibility that the powerful dealer creates a price umbrella by holding other dealers to higher costs, and I think that's one that we have to take very seriously, but Sherman 1 should be adequate to take care of it.

MR. SAFERSTEIN: I think your first point is a very good point we haven't talked about much, and Professor Stephen Ross at Illinois has proposed that we clarify and make more objective some of the requirements of the Robinson-Patman in terms of pricing. As a tradeoff for maybe increased enforcement for purposes of reducing the burdens of compliance that Commissioner Litvack talked about, so that there might be a tradeoff that, in effect, business would make, saying, look, if you give us more objective standards we would all understand, we would be a lot happier, wouldn't have such high

compliance costs. It would be more enforceable, but we could live with that.

With regard to power buyers and mergers, I think that's an interesting question. I think it should be something that should come up in mergers, whether you're crediting somebody with sufficient power buying that you come up with the same issues that we come up with in the Robinson-Patman Act.

MR. SPIVA: I think one thing that I was struck by and agree with in Mr. Saferstein's initial comments was how little we actually know. And I think this has come up in some of the questions empirically about the effects of the Act. We really have no idea what types of costs it really imposes, if any, on sellers. Some of the numbers that we've seen in terms of the number of cases that have been brought are actually quite small, suggesting to me that--as I know from my own experience--it's actually quite difficult to bring and to win one of these cases.

So I think that might affect whether--I guess the answer to the first question, whether we

should clarify the Robinson-Patman Act, to me partly depends on what way, but also I think that caution is probably in order given the lack of knowledge. The ABA has said in its comments that it would like to see clarified that the functional discount analysis should not apply to two retailers on the same functional level, for instance.

The other thing I wanted to say in terms of the merger analysis, this actually has come up in the bookselling industry. Barnes and Noble attempted to purchase Ingram a few years back, and the FTC moved to stop that. Talking about power buyers, I mean both of the major chains, Barnes and Noble and Borders, are something on the order of four times as large as the largest publishers out there, and so I wouldn't be surprised in the next few years if we saw them make a move to buy a publishing house. They're already publishing books themselves that are in the public domain. I wouldn't be surprised if they made a move to buy one or more of the publishers.

VICE CHAIR YAROWSKY: Thank you.

Thank you very much.

CHAIRPERSON GARZA: Thank you.

If you can stand yet another thank you, I'll thank the panelists again, and I'll also make an apology, because I mispronounced Mr. Spiva's name in the beginning, and now it's caught on and we're all calling you by the wrong name.

MR. SPIVA: That's okay.

CHAIRPERSON GARZA: But the testimony, the statements that you provide to us and your testimony, and the questions that the other Commissioners have asked have been very thought provoking, and there are a number of things I can think to ask. But let me try this one, and directed it to Mr. Spiva and Mr. Campbell.

Do you agree that price discrimination is unlikely to be a problem in the absence of buyer power?

MR. CAMPBELL: I think it's accentuated with buyer power, but you always have the concern that very possibly someone is getting something that they're not entitled to, either because of the efficiency requirements or not. That's why

objective criteria I think are critical. With today's electronics you can communicate pricing lists from any major manufacturer to any supplier or wholesale distributor like ourselves, and then we know exactly what we have access to and what the pricing is going to be and what the purchasing requirements are going to be from the standpoint of a truckload, et cetera.

CHAIRPERSON GARZA: You don't believe that the existence of buyer power is essential to anticompetitive price discrimination or that it should be a requirement?

MR. CAMPBELL: I think it's accentuated by buyer power.

CHAIRPERSON GARZA: Mr. Spiva, what's your view?

MR. SPIVA: I guess I would say--not to avoid the question, but it would depend on what you mean by power and problem.

CHAIRPERSON GARZA: Well, those were my follow-on questions.

MR. SPIVA: Just to anticipate that, I

think generally no. I mean, to the extent that buyer power doesn't mean a buyer monopsony. I guess there have been studies that, sometimes buyers who control 10 percent or less of the market can actually have the power to get significant price concessions that aren't justified by efficiencies, so I think it's less likely in the absence--inefficient price discrimination is less likely in the absence of buyer power.

There will still be price differences, and, speaking for the American Booksellers Association, I don't think that they have a problem with that, even though it certainly makes it harder for small bookstores to compete, but that gets a little closer to competing on the merits. If someone can justify the price--there are some independents who operate retail distribution centers and who can buy in carton quantities and have loading docks, and they should have the opportunity, just as Barnes and Noble and Borders do, to receive additional discounts for those efficiencies that they have, that they bring to

the table.

CHAIRPERSON GARZA: Do you tend to agree with Professor Hovenkamp's observations about the rationale--the likelihood that, in the absence of buyer power, we would actually see sellers engaged in non-efficient price discrimination, and wouldn't sellers prefer not to put buyers in the position of exercising countervailing power if they could avoid it?

MR. SPIVA: I think the answer to the second question is probably yes. I think it may happen in reality before they know it. I think that this relationship between the publishers and the chains and the mass merchandisers maybe kind of got away from them (the publishers), and the attitude of many publishers may be, how do we say no now that they are four times as large as we are, and they can publish public domain works?

I guess I probably generally agree, depending on what the definition of buyer power is, what level of power we're talking about.

CHAIRPERSON GARZA: Then let's get that.

If we assume that buyer power, it would be a good screen to start with, to try to identify situations in which we should be concerned and those in which we shouldn't. Then I'd like to get a sense from the panelists as to what you all mean by power buyer and how we would look at it. I think there probably is a difference between Mr. Spiva and Mr. Campbell on the one hand, and Professor Hovenkamp and Mr. Saferstein on the other. I would like to get a sense as to how you would construct a buyer power screen. Mr. Spiva?

MR. SPIVA: I'm not advocating any additional screen, I just want to be clear. I think, just honestly, the answer to your question is that, in my view, non-cost-justified price discrimination is less likely in the absence of buyer power, but I think that the present screens are sufficient. I mean. I think in some ways the cost justification test actually is a screen for efficient price discrimination.

CHAIRPERSON GARZA: So you would think that, if you can't meet the cost justification defense, and that is presumptively what's going on

here, you must be exercising buyer power.

MR. SPIVA: I think that's likely, yes. I mean, obviously there are other defenses as well, but, yes, I think that's likely.

CHAIRPERSON GARZA: Professor Hovenkamp?

MR. HOVENKAMP: There are two, really, and only two, circumstances in which, in the absence of horizontal collusion, price discrimination can be anticompetitive. One is where the seller is a monopolist, and there's a big economic debate about whether price discrimination by monopoly sellers should ever be anticompetitive, but we have to remember that, in the Robinson-Patman Act context there is no market power requirement. So we're dealing with sellers who have not been found to be monopolists.

In that case, buyer power, that is, the buyer who uses its power to impose higher costs on other competing dealers, is really the only set of circumstances under which you can have anticompetitive price discrimination.

CHAIRPERSON GARZA: I have to turn my time

over to Commissioner Jacobson.

MR. JACOBSON: I'm going to follow up on the same subject. And a quick thank you to each of you for excellent presentations.

I'm going to start and maybe end with Professor Hovenkamp. If we use monopsony as our definition of buyer power, then the number of cases captured by a Sherman Act antitrust injury requirement superimposed on the Robinson-Patman Act is going to be pretty small.

My question is whether, given that we have a number of large buyers who have significant power to achieve lower prices but who may not have monopsony power, but may have power to achieve lower prices and relatively short small shares in appropriately defined relevant antitrust markets--are we nevertheless--should we have any concerns about the long-term consumer welfare implications of such power buyers?

MR. HOVENKAMP: Well, yes, I think we should, but I think they can be expressed through a statute that looks for restraints solicited by

powerful buyers against sellers, and that probably picks up all instances of anticompetitive price discrimination imposed by sellers who are not monopolists.

MR. JACOBSON: Let's look at a hypothetical situation. You have a big box retailer that is able to get significantly lower prices than competing smaller box retailers, but in appropriately defined product markets it has a 15 percent share both on the buying side and the selling side, but the effect of the lower prices over a two- to five-year timeframe is to dry up the smaller retailers in the market so that the share now approaches 30 percent, still not Sherman Act proportions, but 30 percent. Should we have any concerns about those sorts of effects?

MR. HOVENKAMP: I don't think so in the short run. I mean, the chain market looked quite monopolistic at the time the Robinson-Patman Act was passed. We have to remember that, today, most of these big chains are themselves in intense competition with other firms. There are certainly

exceptions to that. There are certainly Wal-Marts in small to medium size cities that don't have significant competition, but for the most part, Wal-Mart competes with K-Mart, Target, and everybody else, and a lot of their inducement of lower prices, first of all, is cost justification, and secondly, it simply reflects the dynamics of chain store competition, and unless there's provable--I mean I'm not saying there's never antitrust injury. I'm saying, if there is, we ought to make a plaintiff prove it.

MR. JACOBSON: Let me ask the same question to Mr. Saferstein.

MR. SAFERSTEIN: As I say, I remain concerned about whether that is, in effect, a backwards or a back-door way of repealing the Act, because it would make secondary line cases so difficult. Employing a power buyer requirement is the same as a competitive injury requirement from my perspective, because it requires defining a relevant market, bringing the economists that we love to testify, and making it into a full-blown rule

of reason case, and I think most plaintiffs in the Robinson-Patman field would fail.

It's a policy choice, whether that's good or bad, but I think we have to recognize that that would probably spell the end of most Robinson-Patman plaintiff cases in the secondary line, and since the primary line ones are almost gone, you would be down to a trickle of somethings, and I don't know what those somethings would be. But it's a policy choice that somebody's got to make. Some people believe that policy choice has already been made, but it is a policy choice.

MR. JACOBSON: Thank you.

CHAIRPERSON GARZA: Commissioner Kempf.

MR. KEMPF: When I listen to Mr. Campbell talk about the grocery industry today, led by Wal-Mart, five firms having perhaps 50 percent or more of the volume, I'm reminded that, at its birth, the Robinson-Patman Act was often referred to as the Great Atlantic & Pacific Tea Company law, and it was a vehicle to guard against them. I don't think they're one of the five any more. You can

hardly find an A&P store these days, and none of the five on the list even existed back then. Certainly Wal-Mart didn't sell groceries.

And the bookstores, I think the biggest threats to them now are probably things like Amazon, which are competing and cleaning clock against both Barnes and Noble and Borders.

It sets me to my framework which is the difference between the façade of competition and the reality of competition. I view the façade of competition as something too many people are anxious to preserve, and I view that as a lot of small scalers scurrying about with a limited selection of poor-quality goods at a high price. And I view the reality of competition as the right number, whether it's large or small, of sellers offering a wide selection appropriate for their competitive playing field, of quality products at a low price. It gets me to a chicken-egg question. I say to myself, are power buyers just people who are offering, have figured out what consumers want, and are succeeding in offering an appropriately

wide selection of quality merchandise at a low price? And if that is good, then I would applaud, not condemn, power buyers. I would think that they are doing exactly what the primary mission of the antitrust law is all about.

As I look at that, I'm reminded, you know, you go to a party, and a lot of people will sit around and say, "You know, America was a better place when I was a kid. When I went to the grocery store then, it was Mr. and Mrs. D'Alessandro's corner grocery store, and they knew who I was. And when I went to checkout to buy a quart of milk for my mom, they'd say, 'Have you been a good boy this week, Johnny?' And they'd pat me on the head, and they'd give me a lollipop. And now I can't find a ma and pa grocery store, and I have to go to some Safeway or some big place. Nobody knows who I am. They have piped in Muzak. Nobody pats me on the head, and nobody gives me a lollipop. America was a better place when I was a kid." I actually believe that.

But in the main, people have voted with

their feet and have said, no, I don't want people to pat me on the head and give me a lollipop and limited choice on high prices. I want impersonal places with wide aisles where I can get a good selection at low prices.

When I look at the testimony, Mr. Campbell, for example, I'm concerned that your Item No. 4, which says we should redefine the purpose and focus of antitrust from increasing consumer welfare to preserving marketplace diversity and consumer choice. I'm fearful that all that is keeping people that consumers don't want in business in business. Can you comment on that?

MR. CAMPBELL: That would be the farthest thing from the truth. What I would like to see is for anyone who wants to enter the marketplace just to have an opportunity to do so. I think the real question about your power buyer question truly is, how did they get to become power buyers? Was it because of lax enforcement of the rules that we had in place that allowed them to grow to such a scale and a size because they got the opportunity for

special packaging on products or special promotions, which led to better pricing and payment terms?

Today, power buyers can demand those things, but who's to say that they didn't have all of those things all along to secure the size and scale that they achieved today? Well, we can't turn the clock back. We're here today and now. What can we do to improve the situation? And all I would ask for is never a preference. I don't want a price break. I don't want a crutch. I don't want anything other than an equal opportunity to compete, which means I need to know that the products are available. I need to have the packaging that is available. I need to know of the promotional allowances and what I qualify for. I need to know the pricing and what the determinant of the pricing is, the economically efficient determinant of the pricing, and what your payment terms are.

We do not get that. Therefore, we are competing in a game where the rules are different for some of the players. That's all we have ever

asked for. That's why we see a deficiency either in the current law and/or its interpretation, whether it be court-related or FTC-related. It's that, in the marketplace today, if I wanted to form a consortium of you to go into business, and you joined our organization, and you found a product in the marketplace that you wanted to sell in your store, and I said, "I can't get it, because manufacturer XYZ does not sell it to me," I think you would be a little aggrieved about that.

MR. KEMPF: Let me just ask quickly the reciprocal question of Mr. Saferstein and Professor Hovenkamp. You both have statements--it's your point No. 3, Professor, and it's on page 4 of your written remarks, Mr. Saferstein. Let me use yours. You say the Act has some benefits in giving small independent businesses, so-called "mom and pop stores," a modicum of price parity with chain stores and mass merchandisers. Why is that a benefit? And that is the same question I have for you, where you sort of make the same--

MR. SAFERSTEIN: As I say, part of this

maybe we don't know, but the assumption is that the one thing that the mom and pop stores need to compete is equivalent price or at least a shot at a price. If the consumers are voting with their feet and going to the bigger stores, the assumption is, in part, they're going because they think they can get a better price. And what the Robinson-Patman Act is supposed to do is to give them a shot at that same price, so at least they have a chance to compete on other terms.

As I say, what you've talked about is really the chicken and the egg. We don't know whether the superstores have gotten there because they have gotten better prices and have done that fairly, or because they are better competitors and more efficient competitors in other ways.

MR. KEMPF: It goes back to what Commissioner Litvack was asking at the outset, when Mr. Campbell said, "All I want to know is the terms," and it's one truckload versus 100 truckloads, where the independent could never buy 100 truckloads. And it's also dealing with a store

that has--a chain that has 500 stores. They may have one sales manager where 500 independents have 500 sales managers.

I think my time should be up.

CHAIRPERSON GARZA: Commissioner Shenefield.

MR. SHENEFIELD: Does any member of the panel favor retention of the criminal provision?

MR. SAFERSTEIN: No, I don't think so.

MR. SPIVA: We don't take a position on that.

MR. SHENEFIELD: But you don't favor it affirmatively?

MR. SPIVA: No.

MR. SHENEFIELD: Mr. Campbell?

MR. CAMPBELL: That's not our purpose.

MR. SHENEFIELD: Second, I think maybe I'll start with Professor Hovenkamp. Would you be content as a practical matter with putting into the statute a market power requirement for secondary line cases, not a harm to competition requirement, but a market power requirement?

MR. HOVENKAMP: Not really, because economic price discrimination is really not what this statute is about. This is not about a seller that has different price-to-marginal-cost ratios on different sales. Section 2 of the Sherman Act will pick up instances of price discrimination by dominant firms that are anticompetitive. The kind of differential pricing that the Robinson-Patman Act is concerned with is pretty much efficient or inefficient under the same set of circumstances, whether the seller is dominant or non-dominant. So I don't think that improves things a great deal. It would narrow the range of the statutes' coverage. It would reduce the number of cases, but I don't think it would do any better a job of hitting the target that we want to be hitting.

MR. SHENEFIELD: But would it, from your perspective, be an improvement?

MR. HOVENKAMP: Only insofar as it means there would be less litigation, yes.

MR. SHENEFIELD: Mr. Saferstein, what's your response to that same question?

MR. SAFERSTEIN: My response is the same as before, which is that I think it would reduce the number of litigations. It would be tantamount to doing competitive injury, different, but it would require economic testimony, proof of relevant market shares. That would substantially increase the burden on private treble damage plaintiffs in the secondary line cases, and I'm concerned that that would be *de facto* repeal.

MR. SHENEFIELD: But not as much as a full competitive injury requirement.

MR. SAFERSTEIN: I think that's right. Well, I think that's right. It depends on what the economists are charging these days for that slightly narrower proof of--

MR. SHENEFIELD: We'll stipulate they're charging a lot.

[Laughter.]

MR. SHENEFIELD: I have no further questions.

CHAIRPERSON GARZA: Commissioner

Valentine.

MS. VALENTINE: Thank you. John, thank you for asking the criminal question that I was about to pose.

Panelists, thank you all very much for your questions. Why don't I start with Professor Hovenkamp? Let's pretend that we don't think that full repeal of the Robinson-Patman Act is politically feasible, but we would like a world in which it addressed only situations involving buyer power, and you have made several suggestions for minor tweaks that would get us to focus entirely throughout the statute, (a), (b), (c), (d), (e), (f), on lessening competition in a true Sherman 1 competitive injury case. Let's say I want to get rid of (d) and (e); I don't want any of that, just want buyer power. Would you continue to recommend the change to (a), with the lessened competition provision, and nothing in (f), or would you in fact recommend that we also add some requirement, like a plaintiff must prove market power in the buyer?

MR. HOVENKAMP: It depends on whether, in

your hypothetical world, *A&P* is overruled. Under A&P you can violate 2(f) only if the seller is violating 2(a), and if 2(a) has the competitive injury requirement, then that would automatically be read into 2(f). If 2(f) doesn't depend on a 2(a) violation--that is, if it is its own separate basis for a cause of action--then, in my view, there has to be a separate injury to competition requirement under 2(f).

MS. VALENTINE: Let's say we just wanted the perfect statute that would address price discrimination only in cases of buyer power--of market power in the buyer. What would your final recommendation be? Congress gets to do--

MR. HOVENKAMP: Don't ask me to draft this in my head, because these are complicated provisions, but it would be a statute that would make it unlawful for a buyer to induce price discrimination under circumstances that would cause a restraint of trade, which would mean, that would create an inference of higher prices or poorer product quality and so on.

MR. SHENEFIELD: Mr. Saferstein, since we couldn't get you to agree to either the lessened competition in a competitive injury Sherman Act sense, and we couldn't even get you to agree to having plaintiffs prove market power in the buyer or the seller, what would you think of an improvement--I shouldn't say improvement--what would you think of a recommendation that defendants should be allowed to establish a cost justification defense if they can prove that the discriminatory price was reasonably related to the cost savings realized in dealing with a favored buyer?

MR. SAFERSTEIN: I would agree with that. I think the cost justification defense has long been too narrowly construed and too rigidly construed, and I think we all--as I mentioned in my opening remarks, I think that's one place where we all would agree that we need reform, and that should be able to take place through the courts and through the FTC, not necessarily through Congress. It ought to be done. We need that.

MS. VALENTINE: Mr. Campbell, if you do

think that transparency objective and neutral terms are the fair thing, would you likewise agree that, if a defendant could establish the cost justification offense, if they can prove that the discriminatory price was reasonably related to cost savings that were realized in dealing with a favored buyer, that that would be a fair way of addressing this issue?

MR. CAMPBELL: At the very least you would have knowledge of how it was determined and whether or not you can qualify to meet it. But I think narrowly looking at price alone begs the real issue in the marketplace. Today's diverse economy dictates availability of products, availability of packaging, availability of promotional allowances and promotions that are out there. And now, payment terms have become very unique and very creative for some in the marketplace. So if you strictly look at price, that's only one of what I consider to be five key components out there to have that opportunity for equality in the marketplace. And our discussion here centered so much on price;

there's more to it than price.

MS. VALENTINE: I understand that. I'm just tackling one at a time.

Mr. Spiva?

MR. SPIVA: Yes. I just want to indicate that I actually don't agree with converting the cost justification standard to a reasonable relationship standard. I think that's way too amorphous. It actually I think would impose greater costs on sellers in terms of compliance because how do you know when you're in violation of that unless we spend another 20 years developing a body of case law that interprets “reasonable relationship”? And I also question whether, in practice, the courts actually interpret the cost justification defense, at least in recent times, to the penny, as maybe they did in the early years of Robinson-Patman cases.

That certainly--like I say, we never got to a final decision, but that wasn't my experience. In our case, of course, there was not even, I would argue, a reasonable relationship between the types

of terms that were being sought and received and any supposed cost savings. But I think unless it were much more tightly defined, you know, grafting the words "reasonable relationship" onto the cost justification defense would really, (A) it could just swallow the rule, and (B), it actually could make it harder for sellers because, until this is litigated out, how do you know what that really means?

CHAIRPERSON GARZA: We actually have a little bit of time here, and let me ask--oh, Commissioner Warden, I'm sorry.

MS. VALENTINE: And Mr. Delrahim is back too.

CHAIRPERSON GARZA: Commissioner Warden.

MR. WARDEN: Thank you, Chairman Garza.

Mr. Saferstein, you are pretty clear that services shouldn't be added to the coverage of this Act, assuming the Act is retained. Isn't it absolutely clear that services such as credit card processing are almost more commodity-like than commodities? I mean, they don't bear any

resemblance at all to legal services, engineering services, and so on, or even the plumbing services. Isn't the legislature capable of making a distinction between professional services and services of craftsmen, and the provision of purely commercial services like credit card processing?

MR. SAFERSTEIN: That's an interesting proposition, and my sense is that we have enough troubles with the Robinson-Patman Act without going into services, and that's why I think the expansion of it is a problem. Although hearing the issue on credit cards is an interesting part. As you know, a lot of services can be covered by virtue of promotional allowances and services so that, when it comes to pricing, the Robinson-Patman Act does expansively interpret price to include credit terms, shipping terms, all kinds of things. But if you're talking about the separate supplying of things like credit card services, that's an interesting concept. I have not really thought enough about that to see whether you could think of a way to carve out particular types of services

that are commodity-like that we could add, and I haven't seen enough litigation or writings to take a position.

But it's certainly an interesting concept, that there are certain types of services where you can make a like grade and quality analogy, and you wouldn't have the kind of problems we foresee in trying, as I say, financial services or legal services.

MR. WARDEN: Thank you.

Mr. Spiva, how is it that small stores promote diversity of titles, when, as you acknowledge, the superstores stock far more titles per store, and Amazon, I suppose, stocks even more?

MR. SPIVA: That's a fair question. First of all, I should say that the typical superstore stocks far more titles than the typical independent. There are independent superstores like the Tattered Cover in Denver and Elliott Bay in Seattle, *et cetera*, that can go toe to toe-- Powell's in Portland--with the superstores in terms of numbers of titles stocked. The points being in terms of diversity of selection is not the

title selection within an individual store; it's that you have thousands of individual buyers making independent decisions, such that each individual independent's inventory is not a mere replica or subset of the superstore down the street, and so the consumer is going to get different books going into the independent, and obviously there's going to be some significant overlap, but they're going to get some different books going into the independent than they would going into the superstore.

It's not that there's anything wrong with the superstore selection. It's just that you have two separate buyers making independent decisions. The chains by nature make centralized buying decisions. They may have a committee of folks who do the decision-making, but they're making decisions for all of the chain stores by and large.

And so if you have two companies you're going to get two sets of inventory nationwide, whereas if you have a thousand different buyers nationwide, you get a thousand different

inventories. But there's a second point that is perhaps more important than that, and that's diversity of promotion, because the mid-list and back-list books are not what, by and large, the chains are about promoting. If you walk in there you're going to see a stack of the best sellers and--I'm not being pejorative--but the independents are known for hand selling, for promoting books that are unknown and getting them into the customer's hand.

MR. WARDEN: That's all anecdotal. We don't have any empirical evidence that bears out any of this, I don't think.

MR. SPIVA: On either side, that's true. Well, I guess I should say, with the exception of the study I cited. I don't know if you'd call it empirical, but it certainly was rigorous, the study by Mr. Kirkpatrick of mid-list books that he did for the Authors Guild a number of years ago.

MR. WARDEN: I've never had trouble in Barnes and Noble finding the title I want to find; I don't care whether it's out front or not.

MR. SPIVA: Sure. But if it affects the number of books that actually get published ultimately, we won't know what we're missing actually.

MR. WARDEN: I understand the argument.

Mr. Campbell, Mr. Litvack earlier referred to your dichotomy at page 17 between consumer welfare on the one hand, and marketplace diversity and consumer choice on the other. Mr. Spiva does not accept that semantic dichotomy. My question to you is, wouldn't you be better off not accepting it either in arguing that diversity and consumer choice are elements of consumer welfare?

MR. CAMPBELL: If that's the way it's to be defined, then I would accede to that definition, but I would say and submit to you that consumer welfare has not been defined that way, either by courts or by the FTC.

MR. WARDEN: You're quite right. I just don't think you should cede the ground. I have nothing more.

CHAIRPERSON GARZA: Commissioner Delrahim,

we have time if you had any questions that you wanted to put.

MR. DELRAHIM: No questions.

CHAIRPERSON GARZA: Rather than let these gentleman go, because I know there are a lot of issues to cover, are there are any other Commissioners who have a question that hasn't been asked who would like to raise it? Commissioner Jacobson?

MR. JACOBSON: I would like to follow up on the same inquiry. The question I have is, if we're looking at consumer choice and diversity, which I do believe is a part of consumer welfare, what is the limiting principle? Because if consumer choice is the goal, than any horizontal merger that eliminates the smallest competitor violates that principle. How would--and I'm going to direct this to Mr. Spiva and Mr. Campbell--how would you apply that factor in analyzing matters under the Robinson-Patman Act?

MR. SPIVA: I wouldn't add it as an explicit element of a Robinson-Patman claim. I

just am making the point that the Act actually promotes choice and that that's one of the values and policy goals of the Act.

Now, as with all--I don't want to call it a bright-line rule because we all know that the language and the history of the statute is kind of murky. But as with all rules, it's both over- and under-inclusive. It probably preserves some competitors who ought to go out of business, and certainly the American Booksellers Association's position is that it preserves many but not nearly all competitors who deserve to stay in business because they provide valuable choice to the consumers, but I think it--the point being that the Act, in and of itself, in giving a better chance to compete because they can get better terms through enforcement or the threat of enforcement, helps to preserve choice.

MR. CAMPBELL: I would harken back to the equality of opportunity discussion, that all I see happening is, when you deny someone the chance to compete, you don't know whether or not they can

succeed or fail on their own merits. I would never advocate any kind of subsidy, any kind of preference to any competitor in the marketplace. It's just having access to the products, the packaging, the promotions, the pricing, and the payment terms. When you have access you have a chance to succeed or fail. I've got customers that are not efficient. They will go out of business. There's nothing I can do for them. They pay a higher price than my most efficient customers.

MR. JACOBSON: Isn't competition to get a better opportunity rather than sitting back and getting the same opportunity as your rival part of the competition that drives the economy? I think that is what is disturbing to a number of us.

MR. CAMPBELL: I think what's interesting in the American marketplace is that we can't put it into a cubbyhole and just say, "This is what works," because there are some marketers out there who are very successful, at whom I have to scratch my head and wonder how they do it, because they are unique. They're innovative; they're creative. And they do

have a unique or different appeal to the consumer out there, and they may not follow all the marketing strategies, all the advertising strategies that are written about in all the textbooks that I studied back in school, but they do succeed, at the very least because they had a chance to succeed. All we would ever advocate is, let's have a marketplace that allows that to happen so that you can have diversity in the marketplace in the product selection, in the variety, and if they fail because they're inefficient, the marketplace will take care of them in and of itself.

MR. KEMPF: But his question is, as part of the efficiency, is the large buyer saying to the other person, "Look, you don't have to sell to me, but if you want to sell to me you have to come down in price"? And is that person getting the more attractive price then driving the price down at the consumer level? What Commissioner Jacobson is saying is, isn't that a good thing, that you have large buyers who are putting pressure on sellers to help drive price down? And if the other people go

out of business because they can't meet the price, tough luck.

MR. CAMPBELL: To a certain extent I would agree with that--to a certain extent. But American manufacturing, particularly in the food industry, has become extraordinarily efficient in the last 10 to 15 years, and a lot of that has been forced by the buyer community, which says you've got to come down on your price, and you've got to get it that way.

Unfortunately, however, when they have not been able to get to the price they've wanted, they've gone with manufacturing outside of the United States, and they force someone else to meet that price outside of this country where there weren't the restrictions of environmental laws, wage laws or the legal environment that we have here. So we can't totally say that the power buyer has made life wonderful. It has reduced certain prices, but there has been a cost in that happening. And has it occurred in a fair marketplace? In some cases I'd say yes; in some cases I would say no.

MR. KEMPF: I have a quick question for Mr. Saferstein. You made two points, and my fellow Commissioners have followed up on one of them but not on the other. It sounded to me like your two strongest arguments against repeal of the Robinson-Patman Act were (A), the states would fill the void, and (B), in the effort Congress would screw it up. And several people asked you about the state void one, but I'm interested if you would comment more on the second one, that Congress would screw it up. Because a number of the Commissioners did pose questions that said, rather than either leave it as it is or repeal it, don't we want to tinker with it? A variety of Commissioners asked that question, and your comment that no one has followed up bears on that. That's why I pose it.

MR. SAFERSTEIN: We've discussed this a lot in our groups that talk about the Robinson-Patman Act, and I think we all fear that, in the political climate of Congress today in Washington, and given the contentious nature of the Robinson-Patman Act, it typically brings out, you

know, killing off the small, independent business person, and a lot of different political tensions so that you might get a messy result if you tried to tinker with it. And, indeed, you might get a messy result even if you tried to repeal it, since that--somebody would probably have some clever way of repealing it that might not be a real repeal. And so you could end up in a worse situation, is all we're saying, especially in the tinkering stages if you try to tinker it. So that we who have thought about this think that if you want to do reforms, the best place to do reforms would be through the Federal Trade Commission, which has historically enforced the Robinson-Patman Act and has the expertise, the power, and the moral suasion to do some reforming without having to go to Congress.

MR. JACOBSON: Without agreeing or disagreeing with that, let me make my own observation that I think, given the purposes of this Commission, that argument, however valid or invalid, is inadmissible for us. I don't think we

can assume that Congress is going to screw it up.

MR. SAFERSTEIN: I'd defer to your judgment on that.

CHAIRPERSON GARZA: I'm going to give an opportunity to Commissioners Litvack and Warden, and then I had one little question myself.

MR. LITVACK: I just want to ask Mr. Campbell, you made the statement when--in response to me, and you've made it several times since, I think, in response to Chairman Garza, that price is one element. There are five, you said, and among them, for instance--and what you seem to have focused on a lot--and maybe I have overemphasized it--was packaging. And you were saying, you know, I have got to get the same packaging.

I am just curious. If a buyer develops a unique packaging or says even to the seller, "I want a unique packaging, and the only way I'm going to promote this is through this unique packaging," are you nonetheless of a mind that that packaging should be made available to you?

MR. CAMPBELL: You're saying the buyer

created the packaging?

MR. LITVACK: Let's start there; the buyer created the packaging.

MR. CAMPBELL: And they apparently took it to a national brand manufacturer, and the national brand manufacturer created it? I feel that we should have access to that packaging, because if you do not, and the consumer desires that package, you're forcing the consumer to shop at one place to get it.

MR. LITVACK: Absolutely true. You are. And my question to you is, I gather you're telling me you think that is unfair, even though the buyer develops the package, promotes the package, has the idea for the package and says to the seller, “The only thing I want from you is, make it and sell it only to me.” You think that's unfair?

MR. CAMPBELL: It creates concern for me only because it's a national or regional brand being promoted. If it's their private label, that's fine. That is their private or controlled label. But a national or regional brand is being offered in the marketplace to all the sellers that are eligible.

MR. LITVACK: But package--what I'm focusing on is that the packaging is unique. The brand may be available in a variety of other formats, but the packaging is unique. That, nonetheless, causes you concern.

MR. CAMPBELL: Let me answer that with an example. I was with a major manufacturer recently, in front of an audience, unfortunately for this person, and I said, "Well, all I'm ever interested in is getting access to your products and the packaging." He said, "Well, you get access to all of them." And the person said, "Oh, by the way, we do have a 24-pack of this item we only sell to discount stores." And I said, "Well, why don't I have access to it?" And the person said, "It won't sell in your stores." I said, "You shouldn't be making that decision. What does it matter to you if I buy a truckload of it and it sits in my parking lot, and I never sell a bit of it?"

MR. LITVACK: What if the seller said, "I made a judgment, which was and is that the discount stores who have this and have it exclusively for

these purposes are going to promote the heck out of it and really sell a lot more of it than they will if, in point of fact, it is widely available." Would that strike you as a valid reason or not?

MR. CAMPBELL: No, because it is funneling the consumer to a limited retailer, which in effect is promoting them. It is giving them a sanction or a seal of approval in the marketplace.

A very simple and almost a childlike example would be, what if the ground-meat manufacturers today came out and said, "We are going to only sell to the class of trade of fast food," so that only Wendy's, McDonald's, and Burger King could sell hamburgers, and you wanted to go down the street or next door to this hotel and get a hamburger, and you walked in there and they said, "I'm sorry, sir. We can't sell hamburger meat anymore. It is exclusively in the class of trade of fast food. You have to go there to get it." I see no difference in that example.

MR. LITVACK: And would your answer be the same if it were not all the ground-meat manufacturers but a

single one that said that?

MR. CAMPBELL: If he's got a branded product, yes, that's available in the marketplace.

MR. LITVACK: Thank you.

CHAIRPERSON GARZA: I have one quick question, and then I'm going to let Commissioner Warden wrap it up for us.

Professor Hovenkamp, focusing on secondary line competition, what would you expect to happen if the Robinson-Patman Act were repealed tomorrow? And I don't mean in terms of what volume of litigation would we see, but what would you expect a large number of sellers--would you expect a large number of sellers immediately to change their current pricing and promotional practices? And how so? And why or why not?

MR. HOVENKAMP: I would expect a large number to make changes, and I think nearly all the changes would be good ones. There would be less concern--there would be fewer--there wouldn't be Robinson-Patman Act compliance seminars. So pricing and provision of services and so on would

go the direction the market takes them, and you would see a wider range of differential terms. You would see successful dealers being promoted more aggressively by their suppliers, given discounts, given other kinds of promotions, and so on. And, by and large, I think that's a good thing.

CHAIRPERSON GARZA: Do any other panelists want to answer that question?

MR. CAMPBELL: I would see fewer retail outlets available to sell fewer products, because there would be no incentive to have variety and selection in the marketplace for the consumer because they would have less competition to mandate that they carry more items.

MR. SAFERSTEIN: Given the cleverness of antitrust lawyers in giving compliance advice, I'm not sure there would be a significant change. You might be surprised at how well we've done in giving advice to large sellers.

CHAIRPERSON GARZA: Mr. Spiva?

MR. SPIVA: I think it would--certainly in the book business it would

accelerate--re-accelerate, I guess, the independents going out of business. I don't want to overstate, though, what the Act has done. I think I started out, both in my written comments and here, saying that the Act has severe limitations, and so it doesn't stop a lot of price discrimination. Going back to what you asked a minute ago, there isn't much to stop a power buyer from asking for concessions. They can do it on the meeting competition basis. They can claim to be more cost-efficient. There are a number of grounds on which they can--they can set up their own wholesaler and say give me a wholesale discount. There are a number of things that can be done. I just think that it would essentially undermine the purposes of the Act--the original purposes obviously if the Act is gone. The purposes would be undermined, and small businesses will go out of business quicker.

And part of what makes our economy so dynamic, going back to what Commissioner Kempf was asking about, one reason we don't have A&Ps so much

any more, and Wal-Mart, is that a lot of these businesses that are big started small, and they innovated, and they got big. So I think it would hurt innovation to repeal the Act.

CHAIRPERSON GARZA: Commissioner Warden, would you like to wrap up?

MR. WARDEN: I just wanted to make an observation, which is that I learned, I think probably about 35 years ago, learned well, that buying power of importance exists far below monopsony levels when a client in the industrial chemical business observed, "You may think that the most important person in America is the President or perhaps the Chairman of the Federal Reserve Board. From where I sit, it's the chief purchasing agent of Procter & Gamble."

[Laughter.]

CHAIRPERSON GARZA: Thank you, panelists, very much for your testimony today.

MR. HEIMERT: The Commission will be taking a break for lunch, and we'll resume the hearings at 12:30 p.m. for the remedies panels.

[Whereupon, at 11:33 a.m., the hearing was recessed, to reconvene for Remedies Panels.]

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